No. 82-2140

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court failed adequately to instruct the jury concerning the elements of a charge of defrauding the United States of CETA program funds.

2. Whether petitioner's claim of selective prosecution was sufficiently supported to require holding of an evidentiary hearing.

3. Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women and blacks in that position provides a basis for reversal of a conviction upon an indictment returned by the grand jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 702 F.2d 466.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1983. A petition for rehearing was denied on April 29, 1983. The petition for a writ of certiorari was filed on June 29, 1983, one day out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner and codefendant Mort Levi were convicted of conspiring to defraud the United States of monies appropriated under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, in violation of 18 U.S.C. 371 and 665 (Count

1). In addition, petitioner was convicted on three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U.S.C. 665 (Counts 3, 4, and 5). Petitioner was sentenced to 18 months' imprisonment on Count 1; his sentence to concurrent terms of two years' imprisonment on Counts 3, 4 and 5 was suspended in favor of five years' probation. In addition, he was fined $10,000 on each count. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A8). The pertinent background is as follows: At the time of the events that led to this prosecution, in 1979, petitioner was the president of the North Carolina chapter of the AFL-CIO. Petitioner also owned Precision Graphics, Inc., a printing company located across the street from the labor organization's headquarters in Raleigh that sometimes performed work for the chapter. Prior to 1979, the labor organization had been using independent contractors to maintain its membership data in computerized form, but as early as 1977 petitioner had suggested to the chapter's board that the union should acquire its own computer capacity. Petitioner had also mentioned that there might be CETA funds available for projects the AFL-CIO was interested in (II C.A. App. 1199, 1201). Petitioner was well acquainted with the CETA program; he entered into 15 CETA contracts between 1977 and 1979.

In early 1979 petitioner's interest in the CETA program and his interest in acquiring a computer for AFL-CIO use began to converge. In January petitioner began discussions with a representative of Mohawk-Data Sciences, a firm that had provided equipment for other state AFL-CIO affiliates that was tailored to exchange data with the computers in AFL-CIO national headquarters, concerning acquisition of such a computer for the North Carolina chapter (I C.A. App. 427-431).

Meanwhile, petitioner and co-defendant Levi formed a new company, Precision Data, Inc., which promptly submitted to the North Carolina Department of Natural Resources and Community Development (DNRCD) an application for CETA funds to establish a data processing training program.

Precision Data's proposal was received with some skepticism by DNRCD staff members because officials doubted the need for such a program in the region to be served, and because Precision Data had no staff or plant, nor any experience in data processing training or in the CETA program generally and would be wholly funded by the proposed grant (II C.A. App. 655-657). Petitioner's funding proposal was modified in response to some of these concerns. Because it was a going enterprise with experience in administering CETA training, Precision Graphics was denominated the grantee in place of Precision Data. On May 21, 1979, DNRCD approved a grant of $129,429 to Precision Graphics to operate the proposed data processing training program.

Earlier, in April, petitioner, acting on behalf of Precision Data, had agreed to purchase a computer from Mohawk-Data Sciences, for $41,317.68. The contract prescribed a down payment of $10,329.42, with the balance to be paid in 24-monthly installments. In addition Mohawk agreed to provide Precision Data with maintenance service for $214/month.

On May 21, 1979, the very day that Precision Graphics' CETA application was approved, Precision Data and Precision Graphics entered an agreement for the latter to lease the computer just purchased by the former. A monthly rental of $3,000 and a maintenance fee of $125/*week* was agreed upon. As soon as the CETA contract between DNRCD and Precision Graphics was formalized, petitioner's co-defendant Levi secured an advance of $43,696, and transferred $18,000 of that amount to Precision Data, $9,000 of which was des-

ignated for computer rental charges. Although the computer was not installed until June 15, 1979, on July 3 petitioner issued another check on Precision Graphics' data processing training program account, in the amount of $5,000, to Precision Data for computer rental. In addition although Precision Data's obligation to pay Mohawk-Data for maintenance services (at the rate of $214/month) did not accrue until July 16, 1979, Precision Graphics expended CETA grants funds under its maintenance agreement with Precision Graphics at the rate of $125/week beginning May 21, 1979. The overcharges thus reaped by petitioner through Precision Data were the basis for the indictment.[1]

2. The court of appeals affirmed the convictions of petitioner and his co-defendant. Petitioner had identified 14 issues on appeal, and his brief encompassed numerous additional issues under these headings. The court of appeals determined, however, that "[m]ost of these contentions are of little substance or frivolous" and accordingly limited its discussion to two points (Pet. App. A8). First, the court concluded that petitioner had suffered no prejudice from the district court's instructions that to convict petitioner for violation of 18 U.S.C. 665 the jury could find either fraud or diversion of funds. Although that charge is consistent with the statute, petitioner had claimed error arising from the district court's preliminary instruction, subsequently

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[1] Petitioner's scheme began to unravel in August 1979, when DNRCD's Independent Monitoring Unit began to audit Precision Graphics' performance under its CETA contract. Based upon the results of the audit, the matter was referred for possible prosecution. The discrepancy between the rate of the monthly maintenance charge exacted by Precision Data and its own maintenance costs was the basis for Count 3 of the indictment. The discrepancy between the monthly computer rental charged and the cost to Precision Data of the equipment was the basis for Count 4. The rental charged for the period prior to installation of the computer was the basis for Count 5.

expressly corrected, indicating that the government was required to establish both fraud and diversion of funds. Acknowledging that due process concerns could be raised if the defense had been materially misled, the court of appeals noted that there was no indication that petitioner had relied to his detriment upon the incorrect preliminary instruction in framing his defense, that upon the record of this case the evidence of fraud and misapplication of funds was inseparable, and that there was no pertinent line of defense that might have been pursued that was not developed. Pet. App. A8-A13.

Second, the court of appeals upheld the denial of motions by petitioner and his co-defendant to dismiss the indictment based upon alleged statistical underrepresentation of blacks and women among federal grand jury forepersons in the Eastern District of North Carolina (Pet. App. A13-A19).[2] The court of appeals

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[2] In the district court, the claims of petitioner, a white male, and his co-defendant Levi, a black male, rested both upon the allegedly non-representative composition of grand juries as a whole in the Eastern District of North Carolina, as reflected in a sample drawn from the master grand jury list, and the alleged underrepresentation of blacks and women in the position of foreperson. I C.A. App. 205-208. Although defendants' argument was not wholly explicit in this respect, their claim was stated alternatively in terms of "discrimination" (presumably in violation of the equal protection component of the Due Process Clause) and failure to reflect "a fair cross section of the community" (presumably in violation of 28 U.S.C. 1861). See I C.A. App. 205, 207. Defendants adduced statistical evidence for underrepresentation of blacks and women among grand jury forepersons, and on the list from which potential grand jurors were called (*id.* at 170-192). As to the former disparity, defendants argued that they had established a prima facie case that required the government to rebut an inference that the cause of the statistical disparity was discrimination by the judges of the United States District Court for the Eastern District of North Carolina in their supervision of the grand jury (*id.* at 207). The government did not present a rebuttal case but argued instead

recognized (Pet. App. A14-A15) that, in *Rose* v. *Mitchell*, 443 U.S. 545, 551-552 n.4 (1979), this Court had reserved the issue whether discrimination affecting only the selection of grand jury forepersons requires reversal of a conviction upon the resulting indictment. The court of appeals observed that, in contrast to the situation in *Rose*, federal grand jury forepersons are chosen from among the members of the grand jury itself, and their duties are purely ministerial and provide them with no special influence over the rest of the grand jury (Pet. App. A16-A17). Accordingly, although cognizant of the contrary decision of the Eleventh Circuit in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), the court concluded that the "role [of a federal grand jury foreperson] is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection" (Pet. App. A18).

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that defendants had not made out a prima facie case of intentional discrimination (*id.* at 210). Relying primarily upon *United States* v. *Coats*, 611 F.2d 37 (4th Cir. 1979), which upheld the jury selection plan of the Eastern District of North Carolina against a challenge based upon much of the same data adduced here (see I C.A. App. 171, 174-175, 199), the district court denied defendants' motion to dismiss the indictment (*id.* at 212-214).

On appeal, defendants' claim rested exclusively upon alleged underrepresentation of blacks and women among forepersons, and was predicated entirely upon an equal protection theory (Levi C.A. Br. 8-15; Hobby C.A. Br. 45). However, the argument that petitioner had standing to press the equal protection claim was supported by citation only of cases presenting Sixth Amendment fair cross-section claims (*Duren* v. *Missouri*, 439 U.S. 357 (1979); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975)) or due process or statutory claims (*Peters* v. *Kiff*, 407 U.S. 493 (1972)) (Levi C.A. Br. 15).

ARGUMENT

Petitioner tenders three issues for review in this Court. The first two plainly are insubstantial and do not warrant further review.

The remaining issue, which concerns the identity of grand jury forepersons, may warrant this Court's attention. The decision of the court of appeals in this respect does not conflict with any decision of this Court and is supported by persuasive reasoning and strong policy considerations. Nevertheless, the court of appeals' decision does conflict with decisions of the Eleventh Circuit, and the conflict has become entrenched subsequent to the filing of the petition for a writ of certiorari. Although practical and legal considerations noted below might warrant denial of review at this time, we do not oppose further review here limited to this issue.

1. Petitioner claims (Pet. 17-19) that the court of appeals' decision "sanction[s] an indefensible sort of entrapment" (Pet. 18, quoting *Raley* v. *Ohio*, 360 U.S. 423, 425-426 (1959)). As we shall explain, however, no entrapment defense was raised by petitioner in the district court and no error on this score was alleged in the court of appeals. The court of appeals accordingly failed to address any such issue, and there is no occasion for review of any entrapment claim here.

The substance of petitioner's contention is that the district court erred in declining to adopt a proffered instruction to the effect that one who discloses to government agents "the material facts necessary for an understanding of a particular transaction" prior to obtaining payment in respect thereof from the government cannot be liable for fraud in connection therewith (see Pet. 18). But the requested instruction does not outline an entrapment defense. Petitioner does not suggest that he lacked a predisposition to commit the acts constituting the offenses charged, or that he was induced to

commit them by the advice of government agents. Petitioner's reliance on *Raley* v. *Ohio*, *supra*, and *Cox* v. *Louisiana*, 379 U.S. 559 (1965), is accordingly misplaced. See also *United States* v. *Russell*, 411 U.S. 423 (1973). Rather than raising an entrapment defense, petitioner's argument seems to be simply that he did not in fact deceive the government. But the jury was adequately instructed on this subject. The fraud element of the offense was defined as "an intentional perversion of truth for the purpose of inducing another, in reliance upon it, to part with something of * * * value" (III C.A. App. 1779). Accordingly, no question of general importance is raised by petitioner's contentions.

We note, as well, that petitioner raised no objection to this aspect of the instructions given, nor did he raise any specific objection to the district court's failure to give his proferred instruction, as required by Fed. R. Crim. P. 30. Moreover, in the court of appeals, petitioner did not assign as error the district court's failure to give the particular instruction that is the subject of his contention in this court.[3] This default renders consideration of petitioner's claim for this Court inappropriate.

2. Petitioner contends (Pet. 19-24) that the district court improperly denied him an evidentiary hearing on his selective prosecution claim; he suggests (Pet. 25-32) that this case requires the Court to resolve a conflict among the circuits as to the standard for determining whether such a hearing is warranted. Assuming that the alleged "conflict" amounts to anything more than

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[3] Petitioner did complain in the court of appeals of the district court's failure to give other, similar, instructions and argued generally that the district court's instructions failed to alert the jury to his theory of the case (Hobby C.A. Br. 14-15, 27-28). Because that theory—to the extent it discloses a legally sufficient defense— was adequately conveyed by the instructions given, these contentions have no merit, and did not warrant discussion by the court of appeals. See page 4, *supra*.

semantic variation, which we doubt, no occasion for its resolution is presented.

Petitioner claims in this Court that his indictment was the first for CETA fraud in the Eastern District of North Carolina, and he observes that various irregularities in other North Carolina CETA contracts were investigated in the same general time period, but apparently did not lead to prosecution. Finally, petitioner's selective prosecution claim rests upon the assertion that he was a labor leader affiliated with one particular political party and known as an advocate of controversial positions on issues of public interest. Pet. 22-23. Petitioner's motion to dismiss the indictment was based entirely on these same allegations (I C.A. App. 231-242). The district court concluded that even assuming that respondent had made a colorable showing that others similarly situated had not been prosecuted, he had presented an insufficient basis for suspecting that the exercise of prosecutorial discretion was guided by political considerations or a desire to burden the exercise of respondent's First Amendment rights. The district court accordingly did not require the United States Attorney to testify concerning the decision to prosecute. The court of appeals affirmed without discussion of this point.

Given the court of appeals' failure to discuss this claim in its opinion, it can scarcely be claimed that the decision of the court of appeals creates a conflict respecting the *standard* for determining whether an evidentiary hearing is required. In any event, however the standard may be framed, no hearing was required in this case. The cases collected by petitioner themselves reveal that every circuit that has addressed the issue requires at least the allegation of some facts that, if proven, would give rise to reasonable doubt as to the permissibility of the considerations that underlie the prosecutor's decisions. Petitioner has not shown that

his factual allegations would be deemed sufficient to meet this test under the case-law of any circuit. Petitioner alleged only that he occupied a certain status—that of an outspoken labor leader with ties to a particular political party. He alleged no facts that suggest that the prosecutorial decision in his case was motivated by his identity. Plainly this cannot be a sufficient basis for casting upon the prosecutor the burden of explaining his decision to prosecute, for virtually any public figure subject to prosecution could claim that he was singled out because of some viewpoint he held that was antithetical to the views of the prosecutor.

The Court explained in *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978), that

> so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Of course, when the decision to prosecute is based upon an impermissible criterion, such as race or religion or the exercise of constitutional rights, the general rule must yield to an exception. See *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). But here petitioner asks the Court to infer from a defendant's identity alone that his prosecution was improperly motivated. Where selective prosecution is alleged, as in cases of alleged vindictive prosecution, whether a presumption of impropriety is warranted must turn upon the likelihood that an impermissible factor will motivate the prosecutor in the particular type of situation involved. See *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982). The facts alleged here pertaining to respondent's identity simply do not establish the "'realistic likelihood'" (*ibid.*; citation omitted) of improper motivation that would warrant the presumption sought.

3. Petitioner contends (Pet. 32-40) that historic underrepresentation of blacks and women among grand jury forepersons in the Eastern District of North Carolina provides a basis for setting aside his conviction unless the government establishes, through the testimony of the judges of the United States District Court for the Eastern District of North Carolina, that the observed statistical disparity does not reflect discrimination.[4]

a. Contrary to petitioner's contention (Pet. 33-34, 36-39), the decision of the court of appeals rejecting this claim is not inconsistent with *Rose* v. *Mitchell*. Rather, as the court of appeals noted (Pet. App. A14-A15), *Rose* expressly reserved the question. See 443 U.S. at 551-552 n.4. All of the language cited by petitioner in support of his assertion that *Rose* "held that racial discrimination in the selection of grand jury foremen was not and could not be harmless error" (Pet. 37; footnote omitted), was directed to an entirely distinct question—*i.e.*, whether any defect in the composition of the grand jury should be deemed irrelevant because the defendant was subsequently convicted by a properly constituted petit jury. See 443 U.S. at 550-559. The question reserved by the Court (*id.* at 551-552 n.4) was whether "discrimination with regard to the selection of only the foreman" was to have the same consequences

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[4] We note that petitioner, a white male, now appears to base his claim at least partly upon a due process theory (see Pet. 32), as well as the equal protection component of the Due Process Clause (see Pet. 36-39, relying upon *Rose* v. *Mitchell*, which addresses an equal protection claim). Compare pages 5-6 note 2, *supra*. To the extent that petitioner raises an equal protection claim, he lacks standing. See *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972); *United States* v. *Cronn*, 717 F.2d 164 (5th Cir. 1983); *United States* v. *Coletta*, 682 F.2d 820, 822-824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983). (A copy of our brief in opposition in *Coletta* has been provided to petitioner's counsel.)

as proven discrimination "taint[ing] the selection of the entire grand jury venire"—the issue presented here.

But *Rose* is not without bearing upon this case. As petitioner notes (Pet. 38), a fundamental premise of the Court's reasoning was that racial discrimination in the composition of a grand jury fundamentally "impairs the confidence of the public in the administration of justice" (443 U.S. at 556). But, for the reasons summarized by the court of appeals (Pet. App. A16-A18), racial discrimination affecting only the selection of a grand jury foreperson has no such effect. Unlike his counterparts under the laws of some states, the federal grand jury foreperson is selected from among the members of the grand jury itself, so any discrimination does not at all affect the overall composition of the grand jury. And the duties of the federal jury foreperson, unlike those of forepersons in some states, are essentially ministerial. See Fed. R. Crim. P. 6(c). Thus, any special duties carried out by forepersons do not suggest that they possess disproportionate influence over the deliberations of grand jury members. As the court of appeals concluded (Pet. App. A18), even if the foreperson exercises some marginal degree of informal influence over his or her peers, the role of the foreperson "is so little different from that of any other grand juror" that reversal of convictions and dismissal of indictments is not warranted.

Other substantial considerations support the decision of the court of appeals. First, because petitioner, who is not a member of the allegedly disfavored classes, has standing to raise only a due process claim (see page 11 note 4, *supra*), he must demonstrate that underrepresentation of blacks and women in the position of foreperson "cast[s] doubt upon the integrity of the whole judicial process" (*Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.)). This high standard simply cannot be met in the present context. Second,

inasmuch as each grand jury has but a single foreperson, no inference of actual discriminatory selection sufficient to place the burden of refutation on the government (and the court) should arise from a general pattern of historic underrepresentation. Cf. *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975) (limiting Sixth Amendment fair cross-section requirement to petit jury venires and emphasizing that actual jury panels need not conform to that standard). Because petitioner in no event has any cause for complaint unless *he* was indicted by a grand jury that is unconstitutionally constituted in this respect, the inference of discrimination that arises from statistical disparities in cases where an entire grand jury array is challenged lacks force here. See *Castaneda* v. *Partida*, 430 U.S. 482, 497 n.17 (1977) (noting role of large samples in statistical inference). Third, because of the severe disproportion between the wrong and the remedy, reversal of convictions and dismissal of indictments on the ground of discriminatory underrepresentation of members of a particular class among grand jury forepersons alone, where the grand jury itself is properly constituted, would tend to undermine rather than bolster the "confidence of the public in the administration of justice" (*Rose* v. *Mitchell*, 443 U.S. at 556).[5] Finally, because the designation of forepersons, unlike selection of grand jury members, ordinarily rests in the hands of the judges of district court, preparation of a rebuttal case where discrimination is alleged based upon statistical inference necessarily would impose a substantial burden

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[5] The fact that petitioner was convicted by a validly constituted petit jury *combined with* his indictment by a validly constituted grand jury should suffice to render irrelevant any defect in the selection of a grand jury foreperson. Compare *Rose* v. *Mitchell*, 443 U.S. at 574-579 (Stewart, J. concurring), with *id.* at 551-559.

upon the judiciary. See *United States* v. *Cross*, 708 F.2d 631, 638-639 (11th Cir. 1983).

b. Petitioner also claims (Pet. 34-35) that the decision below conflicts with decisions of the Fifth and Eleventh Circuits. The claimed conflict with *Guice* v. *Fortenberry*, 661 F.2d 496, 498 (5th Cir. 1981), is insubstantial, for the decision there addressed the role of the grand jury foreperson under Louisiana law. On the other hand, as petitioner asserts and as the court of appeals recognized (Pet. App. A15, A18), the decision below is contrary to reasoning of the Eleventh Circuit in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982). In addition to *Perez-Hernandez*, the decision in this case is contrary to the reasoning of the Eleventh Circuit's opinion in *United States* v. *Holman*, 680 F.2d 1340 (1982), and the holding of that court in *United States* v. *Cross*, 708 F.2d 631 (1983). On the other hand, the position of the court below is supported by *United States* v. *Aimone*, 715 F.2d 822, 826-827 (3d Cir. 1983), petitions for cert. pending *sub nom. United States* v. *Dentico*, and *United States* v. *Musto*, Nos. 83-681 and 83-690 (filed Oct. 24 and 26, 1983, respectively)[6] and *United States* v. *Coletta*, 682 F.2d 820, 824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983) (rejecting due process claim).[7] Thus the question

[6] *Aimone* is not necessarily irreconcilable with *Cross*, for the Third Circuit suggested that the disparate results reached "may be attributable to custom and practice that have developed in the respective districts" (715 F.2d at 827). But the Third Circuit also appears to have rejected the Eleventh Circuit's broader premise. *Ibid.*

[7] At the time the petition was filed in this case, the Eleventh Circuit was internally divided on this issue. In *Perez-Hernandez* two judges concluded that discrimination in foreperson selection would require reversal (672 F.2d at 1386). Judge Morgan disagreed (*id.* at 1388-1389). But because all members of the court agreed that the government had successfully rebutted the inference of discrimination and that the conviction accordingly

presented in this case is the subject of a relatively entrenched conflict among the circuits that would, all other things being equal, warrant review by this Court.[8]

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should be affirmed, there was no opportunity for the United States to seek en banc review. Then, in *United States* v. *Holman*, 680 F.2d 1340, 1356 n.12 (1982), a different panel of the Eleventh Circuit deemed itself bound by *Perez-Hernandez* but stated its approval of Judge Morgan's view that underrepresentation of a particular class of persons among grand jury forepersons is in no event a basis for setting aside a conviction or indictment. Because the court again concluded that the government had successfully rebutted the inference of discrimination and affirmed the conviction on that ground, the Eleventh Circuit once again had no opportunity authoritatively to resolve the issue.

Subsequent to the filing of the petition in this case, yet another panel of the Eleventh Circuit concluded that discrimination in foreperson selection provides a basis for challenging an indictment. *United States* v. *Cross*, *supra*. Because the district court had concluded otherwise, no evidentiary hearing had been held on the issue, and the court of appeals accordingly remanded for further proceedings. The government filed a petition for rehearing in *Cross*, suggesting en banc reconsideration in light of the evident intra-circuit and inter-circuit conflict. The court of appeals denied the government's petition for rehearing, even though the active members of that court who sat on *Perez-Hendandez*, *Holman*, and *Cross* are, according to their opinions in those cases, evenly divided, 4-4, on the issue presented.

[8] The appropriateness of further review may also be suggested by the divergent decisions of the courts of appeals on the subsidiary issue of the standing of persons not part of a disfavored class to complain of discrimination. As explained in our Brief in Opposition in *United States* v. *Coletta*, (pages 8-10; see page 11 note 4, *supra*), the Eleventh Circuit has extended standing to such persons without observing any distinction between due process and equal protection claims, whereas the Ninth Circuit has held that such persons have standing to complain only on due process grounds. Most recently, in *United States* v. *Cronn*, *supra*, the Fifth Circuit held that such persons had no standing to raise an equal protection claim, and declined to decide whether a due process claim could be maintained.

c. Practical considerations nonetheless give cause for hesitation as to the necessity of further review at this time. While a conflict among the circuits is apparent, there is good reason to believe that its practical importance is diminishing. As the court of appeals noted (Pet. App. A14 n.6), subsequent to the return of the indictment in this case, blacks and women have been represented among grand jury forepersons in the Eastern District of North Carolina. Moreover, the filing of motions to dismiss indictments such as the one in the present case, and the attention the resulting litigation focuses upon the need for appropriate foreperson selection methods, coupled with increased sensitivity throughout the legal system toward the importance of race- and sex-blind justice generally, is likely to eradicate any improper practices that may formerly have prevailed in this area.

Substantial confirmation for that viewpoint is provided by a survey of United States Attorneys conducted by the Department of Justice subsequent to the denial of our petition for rehearing in *Cross* (see page 15 note 7, *supra*). The responses to our inquiries disclose a striking pattern in those districts where there may have been a historical pattern of underrepresentation of women or minorities among forepersons. In district after district we were advised that in the past few years selection practices of the district court had been altered to eliminate problems that may have existed in the past.[9]

While these decisions are reconcilable, as we explained in *Coletta*, they reflect the recurring nature of the foreperson discrimination issue.

[9] Irrespective of the ultimate disposition of this case, it is the intention of the Department of Justice to take steps to ensure that the United States Attorneys call the attention of the courts in their respective districts to the importance of nondiscriminatory foreperson selection procedures. We have already begun

On the other hand, we are confronted with the Eleventh Circuit's refusal to reconsider the rule it has adopted, and the resulting substantial burden imposed upon prosecutors and the district courts within that circuit. Moreover, if a demonstration of *past* statistical underrepresentation alone is sufficient to put the burden on the court to justify selection practices, this burden will be imposed notwithstanding the reforms we have described above. In view of those reforms, any arguable justification for allowing defendants to enforce by proxy the rights of persons who may have been improperly disfavored as respects the opportunity to serve as a grand jury foreperson (see *Rose* v. *Mitchell*, 443 U.S. at 558) is rapidly disappearing. Because the Eleventh Circuit rule is an open invitation to every defendant (regardless of race or sex) who is indicted by a grand jury with a white male foreperson outside the Third, Fourth and Ninth Circuits, to require the court to account for any past underrepresentation of women or minorities among grand jury forepersons, we believe, on balance, that a prompt resolution of the underlying issue is warranted.[10]

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that process in connection with the survey described in the text. Similar action could be taken through the auspices of the Judicial Conference, the Administrative Office of the U.S. Courts and the Federal Judicial Center. We have called the attention of the staff of the Administrative Office and the Federal Judicial Center to the foreperson selection issue.

[10] Even so, this case is not necessarily an ideal vehicle for that purpose. The precise nature of petitioner's claim is not entirely clear and has apparently changed in the course of litigation. Compare pages 5-6 note 2, *supra*, with page 11 note 4, *supra*. To the extent that petitioner relies on an equal protection theory he—like any white male defendant—is also confronted by a standing requirement which constitutes an alternative basis for affirmance. See page 11 note 4, *supra*. We note, as well, that the record of this case appears to contain no evidence as to any duties carried out by federal grand jury forepersons in the Eastern District of North Carolina apart

CONCLUSION

The petition for a writ of certiorari should be denied as to questions 1 and 2 presented. We do not oppose granting of the petition limited to the third question presented.

Respectfully submitted.

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NOVEMBER 1983

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from the meager role outlined by Fed. R. Crim. P. 6(c). See page 14 note 6, *supra*. Finally, we note that the petition appears to have been filed one day out of time. See page 1, *supra*. Because petitioner's claim does not relate to the process by which his guilt was determined, the Court may prefer to reach this issue in a case presenting no time problem. We anticipate filing a petition for a writ of certiorari in *United States* v. *Cross*, *supra*; petitions are presently pending in Nos. 83-681 and 83-690 to review the Third Circuit's decision in *Aimone*.